(18,310.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 188.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Transcript from the circuit court of the United States for the district of Oregon	1	1
Citation	1	1
Bill of complaint	3	2
Subpœna	9	5
Marshal's return	11	5
Præcipe for appearance for defendant	12	6
Order extending time to plead	13	7
Order extending time to plead	14	7
Demurrer to bill	15	7
Order setting cause for hearing	17	9
Order continuing hearing	18	9
Order continuing hearing, &c	19	10
Order setting demurrer for hearing	20	10
Hearing on demurrer, &c	21	11
Order extending time to file briefs	22	11
Order overruling demurrer, &c	23	12

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	Original.	Print
Order extending time to plead	24	12
Order extending time to plead	25	13
Order extending time to plead	26	13
Plea to amended bill	27	13
Final decree	30	15
Petition for appeal and supersedeas	32	16
Assignment of errors	33	16
Order granting appeal and supersedeas	36	18
Bond on appeal	37	18
Clerk's certificate	39	19
Opinion	40	20
Decree	41	21
Order allowing appeal, &c	42	21
Petition for appeal	43	21
Order allowing appeal	44	22
Assignment of errors	45	22
Bond on appeal	48	23
Clerk's certificate	50	24
Citation and service	51	25

1 United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2388.

Citation.

To the United States, Greeting:

The Oregon & California Railroad Company having, on this day, been granted an order of appeal to the United States circuit court of appeals for the ninth circuit, from the decree entered on June 15th, 1900, in suit No. 2,388 in the circuit court of the United States for the district of Oregon, brought by The United States as complainant against the said company; and the bond on appeal of the said company having been this day filed and approved:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit, at San Francisco, California, on September 3d, 1900, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

2 Given under my hand, at Portland, Oregon, on August 11th, 1900.

CHARLES B. BELLINGER, *Judge.*

Due service admitted on August 11th, 1900.

JOHN H. HALL,
U. S. Attorney, District of Oregon.

(Endorsed:) No. 2,388. United States circuit court of appeals, 9th circuit. United States *vs.* Oregon and California Railroad Co. Citation. United States circuit court. Filed August 11, 1900. J. A. Sladen, clerk. District of Oregon. Wm. D. Fenton, Portland, Or., and Wm. Singer, Jr., N. E. corner Second and Mission streets, San Francisco, Cal., attorneys for appellant.

In the Circuit Court of the United States for the District of Oregon, April Term, 1897.

Be it remembered, that on the 15th day of April, 1897, there was duly filed in the circuit court of the United States for the district of Oregon, a bill of complaint, in words and figures as follows, to wit:

3 In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant.

Bill of Complaint.

To the honorable judges of the circuit court of the United States for the district of Oregon, sitting in equity:

The United States of America, by Joseph McKenna, its Attorney General, brings this its bill of complaint as against the above-named defendant, and complaining says:

Par. 1. That during all the times hereinafter mentioned, the Oregon & California Railroad Company was a corporation duly incorporated under and by virtue of the general laws of the State of Oregon.

Par. 2. That the Congress of the United States by an act entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," approved July 25, 1866, authorized such company organized under the laws of Oregon, as the legisla-
4 ture of said State should thereafter designate, to construct a railroad and telegraph line within the State of Oregon, beginning at the city of Portland, and running thence through the Willamette, Umpqua, and Rogue River valleys to the southern boundary of Oregon, there to connect with another railroad authorized in said act to be built in the State of California, and granted to said Oregon Company every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, ten on each side of said railroad, and when any of said alternate sections or parts of sections should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands designated as aforesaid should be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections, and as soon as the company should file in the office of the Secretary of the Interior a map of survey of said railroad, or any portion thereof not less than sixty continuous miles from either terminus, the Secretary of the Interior should withdraw from sale the public lands therein granted on each side of said railroad so far as located and within the limits above specified.

And your orator shows that by joint resolution, adopted October 20, 1868, of the legislature of the State of Oregon, the Oregon Central Railroad Company was designated, in accordance with said last-mentioned act of Congress, as capable of receiving and
5 undertaking the privileges, franchises, grants, and duties above set forth, and did become the corporation entitled to

all the benefits and subject to all the obligations of said act of Congress, and that on or about April 4, 1870, the said Oregon & California Railroad Company, a corporation duly organized under the laws of Oregon, became the successor and assign of said Oregon Central Railroad Company.

Par. 3. And your orator would further show unto your honors, that in the year 1870 the officers of the Oregon & California Railroad Company definitely fixed the line of said railroad authorized by said act of Congress, and filed a plat thereof in the office of the Commissioner of the General Land Office and presented the same to the then Secretary of the Interior, showing among other things a route along the line authorized by said act of Congress, approved July 25, 1866, and the following-described, among other lands in the State of Oregon, were odd-numbered sections or parts of odd-numbered sections of public lands, not mineral, without the place limits and within the indemnity limits of said proposed line of railroad as designated by said map, viz: the S. ½ of the N. E. ¼, the N. W. ¼ of the S. E. ¼, the N. E. ¼ of the S. W. ¼, and the S. E. ¼ of the N. W. ¼ of sec. 1, tp. 2 south, range 5, west of the Willamette meridian.

Par. 4. And your orator would further show unto your honors, that on the 22d day of November, 1853, John W. Hines, a duly qualified donation claimant under the laws of the United States, duly filed a donation notification No. 3,390 for a half section of land embracing among other lands the S. ½ of the N. E. ¼, the N. W. ¼ of the S. E. ¼, the N. E. ¼ of the S. W. ¼, and the S. E. ¼ of the
6 N. W. ¼ of sec. 1, tp. 2 south, range 5 west of the Willamette meridian, and that the said land was not public land subject to the grant to said Oregon & California Railroad Company.

Par. 5. And your orator would further show unto your honors, that on the 12th day of July, 1871, the President of the United States, without knowledge of the adverse claim of John W. Hines, issued to the defendant, The Oregon & California Railroad Company, a patent for the following-described lands amongst other lands, to wit: the S. ½ of the N. E. ¼, the N. W. ¼ of the S. E. ¼, the N. E. ¼ of the S. W. ¼, and S. E. ¼ of the N. W. ¼ of sec. 1, tp. 2 south, range 5 west of the Willamette meridian.

But your orator avers that the ministerial officers of your orator acted mistakenly, erroneously, and contrary to law in issuing patent to the defendant The Oregon & California Railroad Company for the lands described herein under the facts as stated herein, and so your orator avers that said patent to said lands is void and should be so declared, but that said defendant company still claims title to said lands under said patent and withholds said lands from your orator.

Par. 6. And your orator further shows that the Congress of the United States, by an act entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887, directed and authorized the Secretary of the Interior to adjust all grants theretofore unadjusted,

and if it should appear that any lands had been erroneously patented to any railroad company, to make demand for relin-
7 quishment or reconveyance, and if such company should refuse to reconvey within ninety days, then it should be the duty of the Attorney General to commence and prosecute in the proper court the necessary proceedings to cancel such patents and restore title to the United States. And your orator avers that on the 15th day of May, 1895, the total grant of lands in the State of Oregon under said grant of July 25, 1866, to said Oregon Central Railroad Company, to the rights of which said Oregon & California Railroad Company had succeeded as aforesaid was unadjusted, and the Secretary of the Interior, regarding the said patent to the above-described lands as erroneously issued, directed the Commissioner of the General Land Office to request reconveyance as provided by statute, and in accordance with such direction the Commissioner of the General Land Office did, on said 15th day of May, 1895, make demand on said railroad company by a letter addressed to William Mills, land agent of the Oregon & California Railroad Company, controlling the grant for said Oregon & California Railroad Company, for reconveyance of said above-described lands. And your orator avers that no response has been made to said demand for reconveyance as requested, and that said defendant company has refused and still refuses to so reconvey said lands.

Forasmuch, therefore, as your orator is without adequate remedy in a court of law, and to the end that the said defendant company may, if it can, show why your orator should not have the relief herein prayed, and the matters herein may be determined according to equity and good conscience, your orator brings this suit and prays that patent purporting to convey title to said above-
8 described lands may be set aside, canceled, and declared null and void. And your orator prays all other and proper relief in the premises.

And may it please your honors to grant unto your orator a writ of subpœna, issuing out of and under the seal of this court, directed to the defendant, The Oregon & California Railroad Company, commanding it on a day certain and under a certain penalty therein to be specified, personally to be and appear in this court and then and there to answer, but not under oath (an answer under oath being hereby expressly waived), and to abide such order and decree as to your honors may seem proper.

JOSEPH McKENNA,
Attorney General of the United States.
DANIEL R. MURPHY,
United States Attorney for Oregon,
By CHAS. J. SCHNABEL,
Assistant United States Attorney.

Filed April 15, 1897.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

9 And afterward, to wit, on the 15th day of April, 1897, there was issued out of said court a *subpœna ad respondendum*, in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Oregon.
In Equity.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2388.

Subpœna ad Respondendum.

The President of the United States of America to The Oregon & California Railroad Company, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of June next, which will be the 7th day of June, A. D. 1897, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein The United States is complainant and you are defendant, and further to do and re-
10 ceive what our said circuit court shall consider in this behalf, and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said district, or your deputy, to make due service of this our writ of subpœna and to have then and there the same.

Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 15th day of April, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

[Seal of U. S. Circuit Court, District of Oregon.]

J. A. SLADEN, *Clerk.*

Memorandum Pursuant to Equity Rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso*.

11 *Return to Subpœna ad Respondendum.*

UNITED STATES OF AMERICA, } *ss:*
District of Oregon, }

I hereby certify that on the 15th day of April, 1897, at Portland, Multnomah county, in said district I duly served the within *sub-*

pœna ad respondendum upon the therein named, the Oregon & California Railroad Company, by delivering to R. Koehler, vice-president and general manager thereof, personally a true copy of said *subpœna ad respondendum* duly certified to me as United States marshal, together with a copy of the complaint in the within-entitled action duly certified to by Daniel R. Murphy, United States attorney.

HENRY C. GRADY,
United States Marshal,
By H. H. HENDERSON, *Deputy.*

(Endorsed:) No. 2,388. In the circuit court of the United States, for the district of Oregon. In equity. The United States *vs.* The Oregon & California Railroad Company. *Subpœna ad respondendum.* Returned and filed April 15, 1897. J. A. Sladen, clerk. By G. H. Marsh, deputy clerk.

12 And afterward, to wit, on the 7th day of June, 1897, there was duly filed in said court a præcipe for appearance of defendant, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon. In Equity.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2388.

Præcipe for Appearance of Defendant.

The clerk of the above-mentioned court will please enter the appearance herein of the defendant Oregon & California Railroad Company, by the undersigned, its attorneys and counsel.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for Defendant.

WM. F. HERRIN,
Counsel for Defendant.

Filed and entered June 7, 1897.

J. A. SLADEN,
Clerk U. S. Circuit Court, District of Oregon.

13 And afterward, to wit, on Thursday, the 1st day of July, 1897 the same being the 69th judicial day of the regular April term of said court—present the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. July 1, 1897.

Order Extending Time for Defendant to Plead.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendant, it is ordered that the time in which said defendant is allowed to plead herein be, and it is hereby, extended to Monday, August 2, 1897.

14 And afterward to wit, on Friday the 23d day of July, 1897, the same being the 89th judicial day of the regular April term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD CO. } No. 2388. July 23, 1897.

Order Extending Time for Defendant to Plead.

Now, at this day, on motion of Mr. Charles J. Schnabel, assistant United States attorney it is ordered that the time heretofore allowed the defendant herein to plead in this cause be, and the same is hereby, extended to the rule day in September, 1897.

15 And afterward, to wit, on the 23d day of August, 1897, there was duly filed in said court demurrer to the bill of complaint herein, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Oregon. In Equity.

THE UNITED STATES, Complainant,
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2388.

Demurrer to Bill of Complaint.

The demurrer of the defendant, The Oregon & California Railroad Company, to the bill of complaint of The United States, complainant in the above-entitled suit.

The defendant demurs to the complainant's bill of complaint, and for causes of demurrer shows:

1. The said bill does not make out or show such cause or causes

as do, or ought to, entitle the complainant to the relief prayed, or any relief, from or against this defendant.

2. It is not shown that the complainant has any interest in the relief sought.

3. It appears by the said bill that the patent which it asks
16 the cancellation of was issued to the defendant by the complainant on July 12th, 1871; and that this suit is barred by the provisions of section 382 of the Code of Civil Procedure of the State of Oregon.

4. The said bill shows such delay and lapse of time after the patent complained against was issued before this suit was brought, as that a court of equity will disfavor the suit, and refuse to extend relief from the matters and things set forth in the said bill.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, the defendant demurs thereto; and humbly prays the judgment of this honorable court whether it shall be compelled to make answer to the said bill, or any part thereof, and that it be hence dismissed.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

WM. F. HERRIN,
Counsel for the Defendant.

STATE OF OREGON, } ss:
County of Multnomah, }

George H. Andrews makes oath and says that he is the secretary of the defendant, The Oregon & California Railroad Company; and that the foregoing demurrer is not interposed for delay.

GEO. H. ANDREWS.

17 Subscribed and sworn to before me on August 23d, 1897.
[SEAL.] DAVID LORING,
Notary Public.

Due legal service of the within demurrer, by duly certified copy, is hereby acknowledged this 23d day of August, 1897, at Portland, Oregon.

DANIEL R. MURPHY,
Per SCHNABEL,
United States Attorney.

Filed August 23, 1897.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

And afterward, to wit, on Monday, the 4th day of October, 1897, the same being the 1st judicial day of the regular October, 1897,

term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. October 4, 1897.

Order Setting Cause for Hearing.

Now, at this day, comes the plaintiff herein by Mr. Daniel
18 R. Murphy, United States attorney, and the defendant by Mr. Wm. T. Muir, of counsel, and thereupon, on motion of said plaintiff, it is ordered that the final hearing of this cause be, and the same is hereby, set for Friday, October 22, 1897.

And afterward, to wit, on Monday, the 11th day of October, 1897, the same being the 7th judicial day of the regular October, 1897, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD CO. } No. 2388. October 11, 1897.

Order Continuing Hearing.

Now, at this day, comes the defendant by Mr. Wm. T. Muir, of counsel, and moves the court for a continuance of the trial of this cause, heretofore set for Friday, October 22, 1897, and it appearing to the court that such continuance is agreeable to both parties, it is ordered that the trial of this cause be, and it is hereby, continued until the further order of the court.

19 And afterward, to wit, on Thursday, the 9th day of December, 1897, the same being the 58th judicial day of the regular October, 1897, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. December 9, 1897.

Order Continuing Hearing, etc.

Now, at this day, comes the plaintiff herein by Mr. Charles J. Schnabel, assistant United States attorney, and, thereupon, on motion of said plaintiff, and upon stipulation of the parties filed herein, it is ordered that the defendant herein be, and it is hereby allowed sixty days, after the making and filing of a proposed stipulation as to facts in another cause between the same parties in this court, numbered 2,405, in which to take its testimony herein; and it is further ordered that the hearing of the demurrer of the defendant to the bill of complaint herein be, and the same is hereby, continued until the day or days to be hereafter set for the hearings in certain causes in this court, between the same parties as hereto, said causes being numbered 2,272, 2,273 and 2,405, according to the convenience of the court.

And afterward, to wit, on Friday, the 3d day of March, 1899, the same being the 126th judicial day of the regular October, 1898, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. March 3, 1899.

Order Setting Demurrer for Hearing.

Now, at this day, comes the plaintiff by Mr. John H. Hall, United States attorney, and the defendant by Mr. Wm. T. Muir, of counsel, and thereupon, on motion of said plaintiff, it is ordered that the hearing of this cause, upon the demurrer to the bill of complaint herein be, and it is hereby, set for Monday, May 15, 1899.

And afterward, to wit, on Monday, the 15th day of May, 1899, the same being the 30th judicial day of the regular April, 1899, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD Co. } No. 2388. May 15, 1899.

Record of Hearing on Demurrer and Order Allowing Time to File Briefs.

Now, at this day, comes the plaintiff herein by Mr. John H. Hall, United States attorney, and the defendant by Mr. J. S. Moseby, who, upon motion of said United States attorney, is permitted to appear for said defendant in this cause, and Mr. W. D. Fenton, of counsel, and, thereupon, this cause comes on to be heard upon the demurrer to the bill of complaint herein, and the court, having heard the arguments of counsel, will advise thereof.

And thereupon, it is ordered that counsel for the respective parties hereto be, and they are hereby, allowed sixty days from this date in which to file their briefs herein.

22 And afterward, to wit, on Thursday, the 31st day of August, 1899, the same being the 121st judicial day of the regular April, 1899, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILroad Company. } No. 2388. August 31, 1899.

Order Extending Time to File Briefs.

Now, at this day, on motion of Mr. Wm. T. Muir, of counsel for the defendant herein, and upon stipulation of the parties hereto, filed in cause No. 2,272, entitled as above, it is ordered that said defendant be, and it is hereby, allowed until, and including, Monday, September 18, 1899, in which to file its brief herein.

23 And afterward, to wit, on Friday, the 27th day of April, 1900, the same being the 16th judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
OREGON & CALIFORNIA RAILROAD Company. } No. 2388. April 27, 1900.

Order Overruling Demurrer and Allowing Time to Plead.

This cause was heard upon the demurrer to the bill of complaint herein, and was argued by Mr. John H. Hall, United States attorney, of counsel for the plaintiff herein, and by Mr. W. D. Fenton and Mr. John S. Moseby, of counsel for the defendant, and thereupon the court took the same under advisement, and having duly considered the same,

It is now ordered and adjudged that said demurrer be, and the same is hereby, overruled; and it is further ordered that said defendant be, and it is hereby, allowed ten days in which to further move or plead herein.

24 And afterward, to wit, on Monday, the 7th day of May, 1900, the same being the 24th judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD Company. } No. 2388. May 7, 1900.

Order Extending Time to Plead.

Now, at this day, comes the plaintiff herein by Mr. John H. Hall, United States attorney, and the defendant by Mr. W. D. Fenton, of counsel, and thereupon, on motion of said defendant, it is ordered that the time heretofore allowed said defendant in which to further move or plead herein be, and the same is hereby, extended ten days.

25 And afterward, to wit, on Thursday, the 17th day of May, 1900, the same being the 33d judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. May 17, 1900.

Order Extending Time to Plead.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the above-named defendant, it is ordered that the time heretofore allowed said defendant in which to further move or plead herein be, and the same is hereby, further extended ten days.

26 And afterward, to wit, on Monday, the 28th day of May, 1900, the same being the 42d judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

THE UNITED STATES
vs.
THE OREGON & CALIFORNIA RAILROAD COMPANY. } No. 2388. May 28, 1900.

Order Extending Time to Plead.

Now, at this day, on motion of Mr. W. D. Fenton, of counsel for the defendant herein, it is ordered that the time heretofore allowed said defendant in which to further move or plead herein be, and the same is hereby, further extended ten days.

27 And afterward, to wit, on the 29th day of May, 1900, there was duly filed in said court plea of defendant to the bill of complaint herein, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Oregon. In Equity.

UNITED STATES, Complainant,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2388.

Plea of Defendant to Amended Bill of Complaint.

Plea of the defendant, Oregon & California Railroad Company, to the amended bill of complaint of the complainant, filed by leave of court.

The defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said amended bill o

complaint to be true, in such manner or form as the same are therein stated or alleged, for plea to the whole of said amended bill of complaint, says:

28 On January 29th, 1870, the Secretary of the Interior duly accepted and approved the map referred to in paragraph 3 of the amended bill, and prior to July 12th, 1871, this defendant, under direction of the Secretary of the Interior, selected the lands described in paragraph 4 of the amended bill, and fully paid all costs of surveying, selecting, and patenting the same, amounting to more than fifteen dollars; which amount the complainant then received and has ever since retained, without offer to return the same to defendant.

John W. Hines, mentioned in paragraph 4 of the amended bill, abandoned the land described in paragraph 4 of the amended bill, without having paid for it or resided thereon four years; nor was he residing thereon at the time this defendant selected the same, as aforesaid.

All of which matters and things this defendant avers to be true, and pleads to the complainant's amended bill; and prays the judgment of this honorable court whether it ought to make any other or further answer to the said amended bill; and asks to be hence dismissed, with its costs and charges in this behalf, most wrongfully sustained.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

29 STATE OF OREGON, } ss:
County of Multnomah, }

George H. Andrews makes solemn oath that he is the secretary of the defendant Oregon & California Railroad Company; that the foregoing plea is true in point of fact, and not interposed for delay.

GEO. H. ANDREWS.

Subscribed and sworn to before me on May 17th, 1900.
[SEAL.] R. A. LEITER,
Notary Public in and for Multnomah County, Oregon.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

WM. F. HERRIN,
Counsel for the Defendant.

STATE OF OREGON, } ss:
Multnomah County, }

Due service of the within plea is hereby admitted this 29th day of May, 1900.

JOHN H. HALL,
By S.,
United States Attorney.

Filed May 29, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

30 And afterward, to wit, on Friday, the 15th day of June, 1900, the same being the 58th judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the Circuit Court of the United States for the District of Oregon.

UNITED STATES OF AMERICA, Complainant, *vs.* THE OREGON & CALIFORNIA RAILROAD COMPANY, Defendant. } No. 2388. June 15, 1900.

Final Decree.

This cause was heard by the court upon the sufficiency of the defendant's plea to the bill of complaint in this cause, heretofore filed herein, and was argued by Mr. John H. Hall, United States attorney, and by J. S. Moseby and Mr. W. D. Fenton, of counsel for the above-named defendant, and the court having taken the same under advisement, and having overruled said plea, and defendant
31 having declined to plead further herein, and after examination of the facts set forth in plaintiff's bill of complaint, and, upon motion of Mr. John H. Hall, United States attorney,

It is ordered, adjudged, and decreed that the patent issued by President of the United States on the 12th day of July, 1871, to defendant, The Oregon & California Railroad Company to the south ½ of the northeast ¼, and the northwest ¼ of the southeast ¼, the northeast ¼ of the southwest ¼, and the southeast ¼ of the northwest ¼ of section 1, township 2 south, of range 5 west of the Willamette meridian, be, and the same is hereby, set aside, and decreed to be null and void and of no effect, and the legal title thereto restored to the United States, and that plaintiff recover, of and from defendant, its costs and disbursements of this suit taxed at $—.

CHARLES B. BELLINGER, *Judge.*

Filed June 15, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

And afterward, to wit, on the 11th day of August, 1900, there was duly filed in said court petition for appeal and supersedeas, in words and figures as follows, to wit:

32 In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2388.

Petition for Allowance of Appeal and Supersedeas.

The defendant in the above-entitled suit, conceiving itself aggrieved by the decree made and entered herein on June 15th, 1900, granting unto the complainant the relief prayed for in its bill of complaint, hereby appeals from the said decree to the United States circuit court of appeals for the ninth circuit; and the defendant files herewith its assignment of errors asserted and intended to be urged on appeal.

The defendant prays an order of this court allowing its appeal, and directing that transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit;
and that by the order of this court all further proceedings in
33 this case, and upon said decree, may be stayed pending this appeal, upon its (defendant's) giving a good and sufficient bond to be approved by this court.

Dated and signed on August 11th, 1900.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for Defendant.

WM. F. HERRIN,
Counsel for Defendant.

Filed August 11, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

And afterward, to wit, on the 11th day of August, 1900, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2388.

Assignment of Errors.

In connection with its petition for allowance of appeal
34 herein, the defendant makes and files this assignment of errors made by the court, in its decree entered in this cause on June 15th, 1900.

The bill and plea, taken together, show the land in suit properly patented unto the defendant, as indemnity land of the grant made to it (defendant) by the act of Congress approved July 25th, 1866, unless issue of the patent was unlawful because of the donation notification filed on November 22d, 1853, by John W. Hines. In adjudging and decreeing the defendant's patent null, void, set aside, and canceled, and title to the lands thereof restored to the United States, the court erred as follows:

1. Because, as shown by the plea, the said John W. Hines did not reside on the land for four years, nor pay for the land; hence he was at no time qualified to file a donation notification.

2. Because, as shown by the plea, John W. Hines abandoned the land prior to the defendant's selection thereof, without having resided on it for four years or paid for it; hence, the land being within indemnity limits of the defendant's grant, the defendant's selection thereof was lawfully made.

3. Because, as shown by the plea, John W. Hines' donation notification was unlawfully filed, for that he abandoned the land without having resided on it for four years or paid for it; and the proper land officers of the United States ought to have canceled the notification in so far as, if at all, it constituted a record, at or prior to the time of the defendant's selection.

4. Because, as shown by the plea and admitted by the United States in setting the plea for argument, John W. Hines abandoned the land prior to the defendant's selection, without having resided on the land for four years or paid for it; and such facts make it the duty of the proper officers of the United States to cancel the donation notification. Hence it would be inequitable to cancel the defendant's patent.

5. Because approval of the defendant's selection was, in effect, cancellation of the Hines' donation notification.

6. Because the filing of Hines' donation notification constituted no bar to the defendant's indemnity selection of the land.

Wherefore, the defendant (appellant) prays that the decree entered herein may be reversed, that the complainant's bill be dismissed, and that it (defendant) be given the relief prayed.

WM. D. FENTON AND
WM. SINGER, JR.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendant.

Filed August 11, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

And afterward, to wit, on Saturday, the 11th day of August, 1900, the same being the 106th judicial day of the regular April, 1900, term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

36 In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2388.

Order Granting Appeal and Supersedeas.

Having considered the defendant's petition for the allowance of appeal and supersedeas from the decree made and entered herein on June 15th, 1900, and the assignment of errors filed therewith, on motion of Mr. Wm. D. Fenton, of counsel for the defendant, the appeal of the defendant is allowed as prayed, upon giving a bond to be approved by this court, in the sum of five hundred dollars, which bond shall operate as a supersedeas from the date of its approval.

And it is further ordered that a transcript of the record, proceedings, and papers upon which said decree was made, duly authenticated, be sent by the clerk of this court, to the United States circuit court of appeals, ninth circuit, at San Francisco, California.

Dated and signed on August 11th, 1900.

CHARLES B. BELLINGER, *Judge.*

Filed August 11, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

37 And afterward, to wit, on the 13th day of August, 1900, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, for the District of Oregon.

UNITED STATES, Complainant and Appellee,
vs.
OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant. } No. 2388.

Bond on Appeal.

We, R. Koehler and C. G. Sutherland, each of Portland, Oregon, are held and firmly bound unto The United States, complainant above named, in the sum of five hundred dollars, to be paid unto the said complainant; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The Oregon & California Railroad Company, defendant above named, has been allowed an appeal to the United States circuit court of

appeals for the ninth circuit, and supersedeas, from the decree entered in the above-entitled suit on June 15th, 1900; and the condition of this obligation is, that if the said Oregon & California Railroad Company shall prosecute its appeal to effect, and answer the
38 costs taxed in the decree appealed from, together with all damages, interest and cost of such appeal and supersedeas, if it (defendant) fails to make its said appeal good, thence this obligation to be void, otherwise to remain in full force.

Dated, signed and sealed on August 11th, 1900.

R. KOEHLER. [SEAL.]
C. G. SUTHERLAND. [SEAL.]

STATE OF OREGON, *County of Multnomah,* } ss:

R. Koehler and C. G. Sutherland, being duly sworn, each for himself says: I am one of the sureties to the foregoing bond, and subscribed my name thereto. I am a resident of, and freeholder within the State and district of Oregon, and am worth the sum of five hundred dollars over and above all my just debts and liabilities, in property situated in said district, exclusive of property exempt from execution.

R. KOEHLER.
C. G. SUTHERLAND.

Subscribed and sworn to before me on August 11th, 1900.

[SEAL.] DAVID LORING,
Notary Public in and for Multnomah County, Oregon.

The foregoing bond approved, on August 13th, 1900.

CHARLES B. BELLINGER, *Judge.*

Filed August 13, 1900.

J. A. SLADEN,
Clerk United States Circuit Court, District of Oregon.

39 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I, J. A. Sladen, clerk of the circuit court of the United States, for the district of Oregon, in obedience to the foregoing order allowing appeal, do hereby certify that the foregoing pages, numbered from 3 to 55, inclusive, contain a full, true, and correct transcript of the record and proceedings had in said court, in cause No. 2,388, The United States, plaintiff, against The Oregon and California Railroad Company, defendant and appellant, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript is twenty $\frac{40}{100}$ dollars, and that the same has been paid by the appellant, The Oregon and California Railroad Company.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at Portland, in said district, this 30th day of August, 1900.

[SEAL.] J. A. SLADEN, *Clerk.*

(Endorsed:) No. 640. Transcript of record. In the United States circuit court of appeals, for the ninth circuit. The Oregon and California Railroad Company, appellant, *vs.* The United States, appellee. Appealed from the circuit court of the United States, for the district of Oregon. Filed September 1st, 1900. F. D. Monckton, clerk.

40 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
vs.
THE UNITED STATES, Appellee. } No. 641.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
vs.
THE UNITED STATES, Appellee. } No. 639.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
vs.
THE UNITED STATES, Appellee. } No. 640.

Appeals from the circuit court of the United States for the district of Oregon.

Before Ross and Morrow, circuit judges, and Hawley, district judge.

THE COURT:

On the authority of Hewitt *v.* Schultz, Supreme Court Reporter, February 15, 1901, p. 309: Grinnell *v.* R. R. Co., 103 U. S. 739: St. Paul etc. R. R. Co., *v.* Winona etc. R. R., 112 U. S. 720: Sioux City etc. R. R. *v.* Chicago, Milwaukee etc. R. R., 117 U. S. 406; U. S. *v.* Missouri, Kansas & Texas R. R., 141 U. S. 374, the judgment in each of the above-entitled cases is affirmed.

(Endorsed:) Opinion. Filed May 16, 1901, F. D. Monckton, clerk.

41 United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES, Appellee.
} No. 640. Decree.

Appeal from the circuit court of the United States for the district of Oregon.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Oregon, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Decree. Filed and entered May 16, 1901, F. D. Monckton, clerk.

42 At a stated term, to wit: the October term A. D. 1901 of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday the 9th day of October in the year of our Lord one thousand, nine hundred and one.

Present: Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES, Appellee.
} No. 640.

Upon motion of William Singer, Jr., Esquire, counsel for the appellant, it is ordered that an appeal to the Supreme Court of the United States be and the same is hereby allowed; and that the amount of bond on appeal be and the same is hereby fixed in the sum of $300.

43 In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant,
vs.
UNITED STATES, Complainant and Appellee.
} No. 640. In Equity.

Petition for Appeal.

The above-named defendant, conceiving itself aggrieved by the decree made and entered herein on May 16th 1901, appeals therefrom to the Supreme Court of the United States, for the reasons

specified in its assignment of errors filed herewith; and the defendant prays that its appeal may be allowed, and that a transcript of the record, proceedings and papers upon which the said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Your petitioner further prays, that upon giving a good and sufficient bond to be approved by this court, all proceedings in this cause, and upon the said decree, may be stayed pending its appeal.

WM. D. FENTON &
WM. SINGER, JR.,
Attorneys for the Defendant.

WM. F. HERRIN,
Counsel for the Defendants.

44 *Order Allowing Appeal.*

The foregoing claim of appeal, and prayer for supersedeas, are allowed and granted; the supersedeas to take effect upon the filing of a good and sufficient bond in the sum of five hundred dollars, conditioned that the appellant shall prosecute its appeal to effect, and answer all damages and costs if it fails to make its appeal good.

It is further ordered that a transcript of the record, proceedings and papers upon which the said decree was made, under the seal of this court and the hand of its clerk, be sent to the Supreme Court of the United States.

San Francisco, October 15th, 1901.

WM. W. MORROW,
Circuit Judge.

(Endorsed:) Petition for appeal and order allowing appeal. Filed October 16, 1901, F. D. Monckton, clerk.

45 In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant,
vs.
UNITED STATES, Complainant and Appellee.
} No. 640. In Equity.

Assignment of Errors.

The above-named defendant, by the undersigned, its attorneys and counsel, in connection with its petition for allowance of appeal herein, says that the decree in the above-entitled cause, made and entered on May 16th, 1901, is erroneous and against its just rights in the following particulars; that is to say:

The bill and plea, taken together, show the land in suit properly patented unto the defendant, as indemnity land of the grant made to it (defendant) by the act of Congress approved July 25th 1866, unless issue of the patent was unlawful because of the donation notification filed on November 22nd 1853, by John W. Hines. In

adjudging and decreeing the defendant's patent null, void, set aside, and canceled, and title to the lands thereof restored to the United States, the court erred as follows:

1st. Because, as shown by the plea, the said John W. Hines did not reside on the land for four years, nor pay for the land; hence
46 he was at no time qualified to file a donation notification.

2nd. Because, as shown by the plea, John W. Hines abandoned the land prior to the defendant's selection thereof, without having resided on it for four years or paid for it; hence, the land being within indemnity limits of the defendant's grant, the defendant's selection thereof was lawfully made.

3rd. Because, as shown by the plea, John W. Hines' donation notification was unlawfully filed, for that he abandoned the land without having resided on it for four years, or having paid for it; and the proper land officers of the United States ought to have canceled the notification in so far as, if at all, it constituted a record, at or prior to the time of the defendant's selection.

4th. Because, as shown by the plea and admitted by the United States in setting the plea for argument, John W. Hines abandoned the land prior to the defendant's selection, without having resided on the land for four years, or having paid for it; and such facts make it the duty of the proper officers of the United States to cancel the donation notification. Hence it would be inequitable to cancel the defendant's patent.

5th. Because approval of the defendant's selection was, in effect, cancellation of the Hines donation notification.

6th. Because the filing of Hines' donation notification constituted no bar to the defendant's indemnity selection of the *the* land.

Wherefore the defendant (appellant) prays that the said decree be reversed; and that the circuit court of the United States for the district of Oregon be directed to enter a decree dismissing said suit.

WM. D. FENTON &
WM. SINGER, JR.,
Attorneys for the Appellant.

WM. F. HERRIN,
Counsel for the Appellant.

47 (Endorsed:) Assignment of errors. Filed October 16, 1901, F. D. Monckton, clerk.

48 In the United States Circuit Court of Appeals, Ninth Circuit.

OREGON & CALIFORNIA RAILROAD COMPANY, Defendant and Appellant, *vs.* UNITED STATES, Complainant and Appellee. } No. 640. In Equity.

Bond on Appeal.

We, N. T. Smith and J. H. Sharpe, both of the city and county of San Francisco, State of California, are held and firmly bound

unto the United States of America, in the sum of five hundred (500) dollars, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The above-named defendant and appellant has been allowed an appeal to the Supreme Court of the United States, and a supersedeas, from the decree entered in the above-entitled court and cause on May 16th 1901; and the condition of this obligation is, that if the appellant shall prosecute its said appeal to effect, and answer all damages and costs if it fails to make its appeal good, then this obligation to be void; otherwise to remain in full force.

Dated, signed and sealed on October 15th 1901.

N. T. SMITH. [SEAL.]
J. H. SHARPE. [SEAL.]

49 Acknowledged before me on October 15th 1901.

[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

N. T. Smith and J. H. Sharpe, being duly sworn, each for himself deposes and says: I am a householder in the northern district of California, and am worth the sum of five hundred (500) dollars, exclusive of property exempt from execution, and over and above my just debts and liabilities, in property within said district.

N. T. SMITH.
J. H. SHARPE.

Subscribed and sworn to before me on October 15th 1901.

[SEAL.] E. B. RYAN,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing bond is approved.

WM. W. MORROW, *Judge.*

(Endorsed:) Bond on appeal. Filed October 16, 1901, F. D. Monckton, clerk.

50 United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON AND CALIFORNIA RAILROAD COMPANY, Appellant,
v.
THE UNITED STATES, Appellee. } No. 640.

Certificate of Clerk of C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing forty-

nine (49) pages, numbered from one (1) to forty-nine (49), inclusive, to be a true copy of the record, and of the assignment of errors, and of all proceedings in the above-entitled case as the same appear of record in my office, and that the same together constitute the transcript upon appeal to the Supreme Court of the United States herein.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 28th day of October, A. D. 1901.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

51 UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on December 12th. 1901, pursuant to an appeal filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Oregon & California Railroad Company are appellants and The United States of America is appellee, to show cause, if any there be, why the decree rendered on May 16th, 1901, by the said United States circuit court of appeals against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Given under my hand, at the city of San Francisco, on October 15th 1901.

WM. W. MORROW, *Judge.*

Due service by copy of the foregoing citation is admitted on October 21st 1901.

JOHN H. HALL,
M.,
United States Attorney for Oregon, of Counsel for the Appellee.

52 [Endorsed:] No. 640. U. S. circuit court of appeals, ninth circuit. Oregon & Cal'a Railroad Co. *vs.* United States. Citation. Filed October 23rd 1901. F. D. Monckton, clerk. Wm. Singer, Jr., N. E. corner Second and Mission streets, San Francisco, Cal. att'y for —

Endorsed on cover: File No. 18,310. U. S. C. C. of appeals, 9th circuit. Term No. 188. The Oregon and California Railroad Company, appellant, *vs.* The United States. Filed November 8th, 1901.